IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.969 OF 2007

Shri Suresh Kalyanji Bhagat,]
Age:50 yrs., Occ.Business,]
212, residing at Jayant Villa,]
4th Floor, Opp.Worli Vegetable]
Market, Worli Naka,]
Mumbai-400 018.] ..Applicant.

Versus

The State of Maharashtra.] ..Respondent.

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Mr.Aabaad H.H.Ponda, Adv. for the Applicant.

Mr.K.V.Saste, APP, for the State.

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CORAM : SMT.V.K.TAHILRAMANI,J.

DATE : SEPTEMBER 03, 2007.

(IN CHAMBER, 2:45 P.M.)

DATE OF RESERVING THE ORDER : 3rd July, 2007.

DATE OF PRONOUNCING THE ORDER: 3rd September,2007.

ORAL ORDER :

1. Heard the learned Advocate for the applicant and the learned APP for the State.

2. The applicant is seeking bail in C.R.No.II-84 of 2005 of Vashi Police Station, Navi Mumbai. The said case is under Sections 8(c) read with 20 and 29 of the NDPS Act. The case of the prosecution is that 2 Kg. and 900 grams Aphim (Morphine) valued at Rs.12,000/- was seized on 7.9.2005 at about 4:20 a.m. from the premises of the applicant-accused.

3. The learned Advocate for the applicant has submitted that since many years attempts have been made to falsely involve the applicant in many cases including cases under the NDPS Act and the applicant has been falsely implicated in the present case by various persons including his estranged wife Jaya and one Suhas Roghe who is paramour of his wife and the said substance has been planted in the premises so as to falsely

implicate him in a NDPS case.

4. In order to fully appreciate the contentions made by both sides it would be necessary to give a few details of the case, which are as under :-

. In the night between 6.9.2005 and 7.9.2005 one bungalow at Lonawala came to be raided by the police attached to Lonawala Police Station as information was received by them that in the said premises gambling activities were going on. On receiving the information, raid came to be conducted and nine accused came to be arrested. It is the case of the police that in the said gambling case one accused person i.e. Kiran Chheda resident of Ghatkopar, Mumbai was absconding. The said Kiran Chheda is the brother-in-law of the applicant. The applicant is not named as arrested accused or wanted accused in the complaint or in the first remand application preferred in the said gambling case. However accused No.9 in the said case i.e. one Vinayak Sitaram Pawar whose brother Walmiki used to work

with the applicant is claimed to have led the police in search of the present applicant to a flat at Vashi. The said flat was empty at that time and no one was residing there. The said Vinayak Pawar opened the door of the flat with a key which was in his possession and in the said flat the contraband substance was found at about 4:20 a.m. on 7.9.2005. It may be stated here that though the flat did not stand in the name of the applicant, the applicant has admitted that since the year 2003 the said flat was in his possession. However, it is the case of the applicant that at the relevant time no one was residing in the said flat and the flat was empty. Thereafter, the applicant came to be arrested in the present case.

5. Two basic contentions were raised by Mr.Ponda on behalf of the applicant. The first contention was that there is a long history of events which show that since many years somebody was trying to involve the applicant falsely in cases of various nature including Arms Act, NDPS Act etc. and these persons have succeeded in the

present case. The second contention is that though it is admitted that the applicant was the owner of the premises at Vashi where the contraband was found, the applicant was not residing at the said premises and moreover it cannot be said that the applicant was in conscious possession of the contraband. Mr.Ponda submitted that in the facts of this case, there are reasonable grounds for believing that the applicant is not guilty of offence under the NDPS Act and hence the rigours of Section 37 of the NDPS Act would not apply.

6. In order to appreciate the above contentions, it would be necessary to state a few admitted facts. The applicant had filed Writ Petition No.2486 of 2005 before this Court. The relief sought in the said Writ Petition was for transfer of investigation in the cases involving the accused from the concerned police station. In the said Writ Petition on 28.10.2005 the Division Bench passed the following order : "It must be noted here that on 7th September, 2005 large quantity of opium is allegedly recovered from the

applicant and the concerned officer waited till 18th September, 2005 for registration of the F.I.R. Prima facie, this is a case of gross dereliction in duty. Commissioner of Police must look into all aspects of the matter including grievances of the petitioner that he is being falsely involved in this case by his estranged wife and direct responsible and independent officer to file affidavit in reply in this matter."

7. In the said matter i.e. in Cri.W.P.No.2486 of 2005 thereafter the Commissioner of Police for Navi Mumbai submitted a report dated 14th December, 2005 wherein it is stated that one Walmiki Sitaram Pawar was interrogated by the police. Walmiki stated that he is employee of the applicant-Suresh Bhagat. It may be stated here that Walmiki Sitaram Pawar is the brother of Vinayak Sitaram Pawar who was accused No.9 in the gambling case pertaining to Lonawala Police Station. The Commissioner of Police has stated that Walmiki Pawar was called for enquiry during which he has stated that there are disputes

between the applicant on one side and his wife Jaya on the other side. The report of the Commissioner of Police further states that when Walmiki was in Alibaug Jail, Walmiki's mother came to see him and told Walmiki that Jaya Bhagat i.e. wife of applicant had visited their place requesting to involve Suresh Bhagat's (applicant's) name in NDPS case of Kalamboli police station. Looking to the various facts which emerged during the enquiry, the Commissioner of Police handed over the investigation to the Assistant Commissioner of Police, Vashi Division for investigation. As the investigation was entrusted to the Assistant Commissioner of Police, Vashi Division, the applicant felt his grievance was sufficiently redressed, hence he withdrew the Writ Petition on 21.12.2005.

8. In relation to false implication of the applicant in various cases, it is seen that one of the first cases in point of time occurred in June 1997. In June 1997, one unknown lady delivered a box of sweets at the office of the applicant when he was absent. When he opened the same, it found

to contain some narcotic drugs. Therefore, the applicant, went to Worli Police Station and informed them about the same and handed over the said sweet box. Worli Police Station Diary No.75 of 1997 was made in respect of this event.

9. Thereafter, in the year 2000, the applicant received threats from unknown persons that he will be booked in false narcotic cases unless he pays Rs.1 crore. Therefore the applicant filed a complaint to Deputy Chief Minister on 15.5.2000, a copy of which is annexed to the Petition. In the year 2001, on 28.2.2001 the applicant received a telephone call from unknown persons demanding a crore of rupees. He was threatened in the same fashion. He therefore sent a telegram to Commissioner of Police, Assistant Commissioner of Police and, Narcotic Department, Mumbai. On the very day, the applicant also gave his representation to Worli Police Station, Senior Police Inspector, Narcotic Department, D.C.P. Zone-III giving all details. On 28.2.2001 the applicant was threatened with his life and limb, hence he prayed for police protection. He

requested the Deputy Commissioner of Police, Zone-III to provide him with police protection.

10. On 23.6.2002, the applicant was threatened that he will be booked in narcotic cases and the caller told him to contact him on telephone No.0087176188832 or he will be booked in a false narcotic case. A similar call was received on 24.6.2002 at 1:15 p.m.. He therefore wrote letters to Sr.Inspector of Worli Police Station, Commissioner of Police, Assistant Commissioner of Police, Deputy Commissioner of Police and Senior P.I., Narcotic Department. In December 2003, the applicant received phone calls that he will be booked under Arms and NDPS Act by planting weapons and drugs in his premises at Om Rachana CHS Ltd., Flat No.405, 4th floor, Plot No.3, Sector-17, Vashi, Navi Mumbai i.e the very flat from where the contraband in the present case was found. Immediately on 24.12.2003 the applicant wrote a letter to Worli Police Station stating this fact.

11. Thereafter on 30th January, 2004 in the vehicle of the applicant which was parked in the

compound of the applicant at Worli, Mumbai various firearms and some chemical was found by the applicant. The applicant himself informed Worli police Station about the fact and lodged a complaint i.e. FIR No.980 of 2004. Thereafter the police officers from Worli police station came to the spot and in presence of panchas the articles came to be seized.

12. Thereafter, the applicant received a telephone call from telephone number 2342278550. The caller threatened him with dire consequences to his life and limb and also threatened that he will be implicated in a non-bailable offences. The applicant therefore again approached Worli police station on 26.5.2004 and gave complaint which was also forwarded to Chief Minister, Home Minister, Commissioner of Police etc..

13. Thereafter, the applicant wrote letter dated 08.7.2004 addressed to the Hon’ble Chief Justice of the Hon’ble Supreme Court, Hon’ble Chief Justice of Mumbai High Court, Hon’ble Home Minister of India, New Delhi and requested that

the law enforcing authority be directed to take necessary steps to protect him.

14. According to the applicant, on 25.8.2004 the applicant was threatened on telephone that he will be booked in a false narcotic case. He therefore again approached Worli police station and filed a complaint. Thereafter the applicant through his Advocate issued notices dated 28.8.2004 to the Commissioner of Police and other authorities including CBI whereby the applicant has put on record that he apprehended false implication in narcotic cases at the hands of his wife Mrs.Jaya Bhagat, Suhas Roge and Mr.Pankaj Khullare etc..

15. Thereafter, on 30.10.2004 some drugs were planted in the premises of the applicant at Jayant Villa at Worli. The applicant received a phonecall informing him of the same. Hence the applicant informed the police. The police arrived at the spot and they found three packets with some substance of black colour in the said packets and the same came to be seized. The said substance

turned out to be morphine.

16. Thereafter, on 23.11.2004 at about 3:00 p.m. the applicant was threatened with dire consequences to life and limb and even threatened with false implication in narcotic case. The applicant immediately registered his complaint with Joint Commissioner of Police on 27.11.2004. It was against Suhas Roge. In the said letter, it is stated that since 1999 he has been receiving threatening calls stating that he will be booked in false cases and on three occasions they had planted drugs and/or arms and ammunitions in his premises however he came to know about the same well within time and informed about the said planting and the police came and seized the said articles on the complaint made by the applicant. In the said letter dated 27th November, 2004 the applicant has informed the Joint Commissioner of Police (Crime) that the said Shri.Suhas Roghe is a criminal with police record and the applicant had given a complaint against said Suhas Roghe. However, Suhas Roghe on coming to know that the applicant had made a complaint against him, on

26.9.2004 gave a threatening call to the applicant and told him that he would either be murdered or implicated in a false drug case. Infact the applicant had also requested the police machinery to not only grant him police protection at his own costs, but, take steps to put up video cameras in his premises so that if any person tried to plant drugs in the premises of the applicant the person could be nabbed. Not only the applicant sent complaints to a large number of police stations, but, he has also sent complaints to National Human Rights Commission and State Human Rights Commission stating that somebody is trying to involve him falsely and he should be provided with protection by the police. Thus, the applicant made complaints to various police stations including Worli police station within the jurisdiction of which he resided stating that he would be falsely implicated in a NDPS case. As far as the letters to Worli police station in this regard are concerned, the same have been admitted by the prosecution. That letters were sent as above to various other police authorities is not denied by the prosecution. So also letters sent

by the applicant to other authorities is not denied. By letter dated 23.11.2004 addressed to the Senior Inspector of Worli Police Station, the applicant had requested for police protection or guidance from the police department in respect of false planting of narcotic drugs and other contraband in his residence, office premises and in his car. In the said letter, the applicant had expressed his willingness to pay the necessary charges for the police protection.

17. From the above facts, it does appear that since past many years attempts have been made to falsely implicate the applicant in various cases. The applicant on coming to know about the drugs or arms has himself informed the police about the same and thereafter the police have come and seized the drugs or arms. The applicant has also admittedly sought police protection at his own cost in order to save him from being falsely implicated and in order to save him from someone planting anything on him which would implicate him in a case of serious nature.

18. It also does appear from the material that the applicant was receiving continuous threatening calls that he would be booked in a narcotic case or some other case. Infact one such letter dated 8th July, 2004 was addressed by the applicant to the High Court which was received by the High Court. In the said letter these threatening phone calls threatening to involve the applicant in a false narcotic drug are mentioned. Mention is made about telephone calls wherein threats were given of planting more than 10 Kg. heroin at different places i.e. at his office, other premises including flat at Vashi, etc.. The applicant had made complaints to the police stations in this regard including at Worli police station. All these facts have been brought out by the applicant in his letter dated 8th July, 2004. Ultimately on being fed-up, he lodged a complaint with the learned Metropolitan Magistrate, 7th Court at Dadar, Mumbai. In the said case, directions have been issued under Section 156(3) Cr.P.C.. It is pertinent to note that all the above correspondence, letters, telegrams etc. are prior in point of time to the present case.

19. It is the case of the applicant that he has been falsely implicated in the present case by the police on the say of his estranged wife Jaya and Suhas Roghe who is paramour of his wife. Suhas Roge is a gangster having a criminal record. To substantiate this submission of false implication, Mr.Ponda submitted that the present case is an off shoot of the gambling case of Lonawala police station. Raid in the said gambling case took place on 6.9.2005 at about 22:05 hours. Accused No.9 Vinayak Sitaram Pawar came to be arrested in the said case. Though, in the remand application the name of the present applicant is not shown as wanted accused yet in the early hours of 7.9.2005 at about 1:30 a.m. the police officers of Lonawala police station have left with accused No.9 Vinayak Pawar in order to trace the present applicant. It is pertinent to note that the remand application submitted on the next date in the gambling case pertaining to Lonawala police station does not mention the name of the present applicant as wanted accused. Though this was the position, it is the prosecution case that the

Lonawala police along with accused No.9 Vinayak Pawar left for Vashi to trace the applicant. Accused No.9 Vinayak Pawar led them to the flat of the applicant at Vashi. It is an admitted fact that the applicant was not present in the said flat and infact the flat was locked. Accused No.9 Vinayak Pawar opened the said flat with a key which was on his person. Thereafter all of them have entered the flat and the contraband came to be found.

20. As far as Vinayak Pawar taking out the key and opening the flat is concerned, it is seen that the arrest panchnama of Vinayak Pawar in the gambling case does not mention any key being found on his person. Many accused in the gambling case came to be arrested vide panchnama dated 6.9.2005. The said panchnama is drawn from 6.9.2005 from 21:50 hours to 7.9.2005 at 1:05 a.m.. The said panchnama specifically mentions that on the personal search of accused No.9 Vinayak Sitaram Pawar what was found was mobile phone and one leather packet containing Rs.120. These are the only articles which were found on the personal

search of Vinayak Pawar. Immediately after that the police have left along with Vinayak Pawar from Lonawala to Vashi in order to search the applicant who is not mentioned as wanted accused anywhere at that point of time. The contraband came to be found in the flat at Vashi at 4:20 a.m. on 7.9.2005.

21. In the above circumstances, from where Vinayak Pawar took out this key to the flat of the applicant at Vashi is shrouded in mystery. Vinayak Pawar is the brother of Walmiki Pawar and Walmiki has stated to the police which finds mention in the report of the Commissioner of Police, Navi Mumbai that Jaya the wife of the applicant had approached his mother and asked for help to falsely implicate the applicant. This fact assumes importance in the light of the fact that the key of the flat of the applicant suddenly appeared in the hands of Vinayak Pawar in the morning of 7.9.2005 when there is no mention of finding of any key on his person at the time of his arrest a few hours earlier. In such circumstances, opening of the flat with the key

which was supposed to be with Vinayak Pawar and finding of contraband in the said flat appears to be highly suspicious. It is also pertinent to note that in the remand application filed immediately thereafter there is no mention of the visit to Vashi.

22. Though the flat in which drugs were found did not stand in the name of the applicant, Mr.Ponda fairly submitted that the flat belongs to the applicant and he had purchased the same some time in the year 2003. However, Mr.Ponda submitted that the applicant was not staying at the said flat but he was staying at Jayant Villa at Worli which is clear from various correspondence. The correspondence and other material which is on record in various cases does show that the applicant was residing at Worli, Mumbai. It may be stated here that the C.R. pertaining to Lonawala police station in gambling case also shows the residence of the applicant to be at Worli. Since 1997 the address of the applicant is consistently shown as Worli. The station-diary entry of worli police station in the year 1997 and the complaint filed in the year 2002 before the learned Additional C.M.M., 7th Court, Dadar, Mumbai also shows the address of the

applicant to be that of at Worli i.e. at 212, Jayant Villa, 4th Floor, Opp. Worli Vegetable Market, Worli, Mumbai. C.R.No.II-66 of 2005 of Kalamboli police station also mentions the address of the applicant to be the one at Worli.

23. As stated earlier, the learned Advocate for the applicant has fairly admitted that the applicant is the owner of the premises at Vashi where the contraband was found. However, it is seen that it is an admitted fact that at the relevant time the applicant was not in the premises and the premises was locked. Moreover, the statements of various witnesses in the present case show that many different persons including the applicant used to visit the said flat and they used to even reside there. Thus, it is seen that the applicant was not in exclusive possession of the said premises. There is no evidence on record to show that the applicant knowingly permitted others to store drugs in his premises. Mere ownership of the premises would not be sufficient to sustain the charge but it has to be shown that the accused person was in exclusive possession of

the premises and or was in conscious possession of the drugs.

24. The term "possession" is not defined in the NDPS Act. The term "possession" has been judicially construed to mean in various decisions, as under :-

> "Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.
>
> (See in this connection Dula Singh v. Emperor, AIR 1928 Lahore 272 : (1928 (29) Cri LJ 481), Kuldip Chand v. Emperor, AIR 1934 Lahore 718 : (1935 (36) Cri LJ 300), Sunder Singh v. Emperor, AIR 1936 Lahore 738 : (1936

(37) Cri LJ 939), Ram Charan v. Emperor, AIR 1933 All 437 : (1933 (34) Cri LJ 930), and Rubyana @ Smita Sanjit Bali v. State of Maharashtra, 1996 Cri LJ 148 (Bom).)

. The Apex Court in Supdt. and L.R. v. Anil Kumar Bhunja, (1979) 4 SCC 274 : (1979 Cri LJ 1390), observed that the test for determining "whether a person is in possession of anything is whether he is in general control of it." The Apex Court, after examining Salmond's jurisprudence and other earlier decisions rendered by the Court, observed thus (at p 1392-93 of Cri LJ) :

> "13. 'Possession' is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of 'possession' uniformally applicable to

all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of ‘possession’. Much of this difficulty and confusion is (as pointed out in Salmond’s Jurisprudence, 12th Ed. 1966) caused by the fact that possession is not purely a legal concept. ‘Possession’, implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control (See Dias and Hughes, 11th Ed.)

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the

protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that ‘possession’ is not a purely legal concept but also a matter of fact, Salmond (12th Ed. page 52) describes ‘possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining ‘whether a person is in possession of anything is whether he is in general control of it’.

16. In Gunwantilal v. State of M.P. (1973) 1 SCR 508 : (1972 Cri LJ 1187), this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms

Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed (at p 1189 of Cri LJ) :

> In any disputed question of possession, specified facts submitted or proved will alone establish the existence of the de facto relation of control or the dominion of the person over it

> necessary to determine whether that person was or was not in possession of the thing in question.

. In the light of these pronouncements, it is to be examined whether the applicant can be said to be in conscious possession of the contraband which was seized from the flat. To put it concisely, whether the prosecution has collected sufficient material to show that the applicant was in conscious and intelligent possession of the contraband.

25. In the present case, it is clear that the contraband was found from a flat which was visited not only by the present applicant but also by many other persons. Under such circumstances, exclusive possession of the applicant is not made out from the material that has been collected and relied upon by the prosecution. The material on record does *prima facie* show that the applicant was residing at Worli and not at Vashi. It cannot

be said that the material on record shows the exclusive possession of the applicant with regard to the searched premises especially when there is no dispute that besides the applicant many other persons were visiting the said flat. Moreover, the presumption under Section 54 of the NDPS Act would be attracted only in a case where the accused is in conscious possession of the contraband article. As stated earlier, mere ownership of the premises would not by itself be sufficient because it is conscious possession which is contemplated by the penal statute which penalises possession of any contraband article or thing. In my opinion in the present case, it cannot be said that the applicant was in conscious possession of the contraband which was found in the flat at Vashi. Under such circumstances, inspite of the provisions of Section 37 of the NDPS Act it is required to be stated that the applicant would be entitled to be released on bail.

26. The learned APP has submitted that the applicant is involved in many cases, hence, he

should not be released on bail. However, looking to the facts of the present case and the checkered history which shows umpteen attempts to falsely implicate the applicant, I am of the opinion that the applicant is not guilty of the present offence. From the facts it appears that he was not in conscious possession of the contraband and there does not appear to be any reliable material to say that the applicant will again indulge in similar offences, hence I am inclined to grant bail to the applicant.

27. The applicant to be released on bail in the sum of Rs.50,000/- (Rs.Fifty Thousand Only) with one or two sureties to make up the said amount. The applicant shall report to Vashi police station once in a month till conclusion of trial.

28. Application is disposed of accordingly.

(SMT.V.K.TAHILRAMANI,J.)